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No. 02-458

In The

Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN AND RAYMOND B. YATES, TRUSTEE,

Petitioners,

v.

WILLIAM T. HENDON, TRUSTEE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF UNUMPROVIDENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus will address the following question:

Whether a working owner (in this case, a sole shareholder of a corporate employer) is a participant in a plan governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* ("ERISA") where non-owner employees of the corporation are also covered under the same plan.

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INTEREST OF THE *AMICUS CURIAE*[1]

UNUMProvident Corporation is the parent holding company of UNUM Life Insurance Company of America, The Paul Revere Life Insurance Company, and Provident Life and Accident Insurance Company (collectively, the "UNUMProvident Companies"). The UNUMProvident Companies are three of the largest disability insurance carriers in the United States. They are authorized to issue individual and group disability policies in all 50 States. Hundreds of small employers purchase group and/or individual disability policies from the UNUMProvident Companies for the purpose of funding their ERISA-governed employee disability plans. In most cases, the business owner is covered under the same policy and/or the same policy form as the non-owner employees.

When there is a dispute over the payment of benefits under these policies, some jurisdictions (including the Sixth Circuit) hold that claims by working owners are governed by state law whereas ERISA preempts these same state law claims when they are brought by non-owner employees to recover benefits under the same plan. *See, e.g., Fugarino v. Hartford Life and Acc. Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993) (sole proprietor does not have standing to sue for benefits

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[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this Brief *amicus curiae*. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *Amicus* states that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *Amicus*, made a monetary contribution for the preparation or submission of this brief.

under ERISA even though he participated in ERISA-governed health benefit plan that also covered non-owner employees); *Kwatcher v. Mass. Service Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989) (same result involving sole shareholder). The application of disparate bodies of state and federal law to the same benefit plan results in the potential for inconsistent and even conflicting applications of the same policy terms. Inconsistent and conflicting regulation ultimately increases the administrative and litigation costs of these plans, thereby harming the very employees that Congress sought to protect when it enacted ERISA.

This case arose out of a bankruptcy dispute and involves the question of whether Dr. Yates had standing to enforce the anti-alienation provision in his ERISA plan. *Hendon v. Yates*, 287 F.3d 521, 525 (6th Cir. 2002). However, this Court's decision will also determine whether a working owner has standing under ERISA, §502(a)(1)(B) to recover benefits under an ERISA-governed plan and whether any state law claims asserted by the working owner are preempted by ERISA. This is the issue that the UNUMProvident Companies and the employee benefit plans that they insure face on an ongoing basis in the lower federal and state courts. Indeed, several of the circuit court holdings that the petitioners relied on to establish a split in circuit court authority justifying a writ of certiorari involved claims for benefits under disability policies issued to ERISA plans by one of the UNUMProvident Companies or by other disability insurance carriers. *See, e.g., Sipma v. Massachusetts Cas. Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001); *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000); *Wolk v. Unum Life Ins. Co. of America*, 186 F.3d 352 (3d Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000); *Engelhardt v. The Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998). By virtue of their extensive involvement in providing insured benefits to ERISA-governed disability plans, the UNUMProvident Companies have a strong interest in preserving the uniform regulation of the employee welfare benefit plans that they insure.

SUMMARY OF ARGUMENT

The primary purpose of Congress in enacting ERISA was to regulate employee benefit plans under a uniform body of federal law. Congress accomplished this purpose in two principal ways. First, it included a broad preemption clause which was "designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). Second, Congress created a "comprehensive civil enforcement scheme" that is "one of the essential tools for accomplishing the stated purposes of ERISA." *Id.* at 52. This Court has held on several occasions that ERISA's civil enforcement scheme is the exclusive means to remedy disputes arising from the processing of ERISA benefit claims. *Pilot Life*, 481 U.S. at 54; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 54 (1987). Most recently, this Court noted that the civil enforcement scheme of ERISA is an example of an "overpowering federal policy" that employee benefit plan regulation be uniformly federal in character. *Rush Prudential HMO, Inc. v. Moran*, ___ U.S. ___, 122 S.Ct. 2151, 2164, 153 L.Ed.2d 375, 396 (2002).

The decision below that working owners are not participants under ERISA and that they have no standing

to sue under ERISA's civil enforcement scheme, violates congressional intent for uniform federal regulation of employee benefit plans. In the context of a suit for plan benefits, the holding results in a disparity between the state law remedies that are available to the working owner and the federal law remedies that are available to non-owner employees. This is exactly what Congress sought to avoid: regulation of the same plan by multiple bodies of potentially conflicting laws. Fractured and conflicting regulation of employee benefit plans also leads to another result that Congress sought to avoid – increased costs of administering ERISA plans and the possibility that such plans will become so expensive that employers will cease to provide them in the first place. All of these problems are cured when working owners are considered participants under ERISA and have the same remedies as non-owner employees who are covered under the same benefit plan and who are subject to the same plan terms. The Sixth Circuit decision should be reversed.

ARGUMENT

A. A BENEFIT CLAIMANT'S STATUS AS A PARTICIPANT OR BENEFICIARY IMPACTS MULTIPLE ISSUES UNDER ERISA SUCH AS STANDING TO SUE, THE AVAILABILITY OF ERISA REMEDIES, AND PREEMPTION OF STATE LAW REMEDIES.

Dr. Yates' status as a participant under ERISA controls whether the anti-alienation provision of his ERISA plan applies to his interest in the plan. However, the question of a working owner's status as a participant or a beneficiary also arises in the context of whether the owner has standing to sue for ERISA plan benefits and the

related question of whether any state law claims brought by the owner are preempted by ERISA. Thus, a decision regarding Dr. Yates' participant status in the context of his bankruptcy dispute will also determine a working owner's participant status as it affects the administration of benefits under thousands of ERISA plans on a daily basis.

Standing to sue under ERISA is crucial to determining what federal remedies are available to a working owner. ERISA provides federal courts with jurisdiction of ERISA suits, but only where the plaintiff has a specific status under the statute, such as status as a participant or beneficiary. ERISA, §502(e)(1).[2] Section 502(a)(1)(B) provides an express cause of action for the recovery of plan benefits, but such a cause of action is expressly reserved only to participants and beneficiaries.[3] Some lower courts

[2] Section 502(e)(1) [29 U.S.C. §1132(e)(1)] states in pertinent part that "[e]xcept for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretrary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section."

[3] The statute provides that "[a] civil action may be brought – *by a participant or beneficiary* . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA, §502(a)(1)(B) (emphasis added). The statute defines a "participant" as: "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . . " ERISA, §3(7). The statute defines a "beneficiary" as: "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA, §3(8). The language of the statute makes it clear that status as either a participant or a

(Continued on following page)

that have held that working owners do not have standing to sue for benefits under ERISA also hold that ERISA simply does not apply to these claims even though they arise out of an ERISA-governed benefit plan. *See, e.g., Fugarino v. Hartford*, 969 F.2d at 186; *Kwatcher*, 879 F.2d at 965-66.

These same courts have also held that a working owner's standing to sue under ERISA controls what state law remedies are available to the working owner. Where a dispute arises out of the administration of benefits under an ERISA plan, this Court has held that ERISA's remedies are exclusive. *See, e.g., Moran, supra*; *Pilot Life, supra*; *Taylor, supra*. Any state law claims that purport to supplement or supplant ERISA's exclusive remedies are preempted, even where they are otherwise "saved" from preemption under ERISA's express preemption clause. *Id.* Even so, according to some lower courts, where a working owner does not have standing to sue under ERISA's civil enforcement scheme, state law remedies are not preempted by ERISA. *Fugarino, supra*; *Kwatcher, supra. See also Ritter v. Massachusetts Cas. Ins. Co.*, 439 Mass. 214, 786 N.E.2d 817 (2003) (joint shareholder did not have standing to sue for disability benefits under ERISA and her state law claims against ERISA plan insurer were not preempted).

In summary, although not directly presented by the decision on review, the broader question of a working owner's standing to sue for plan benefits under

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beneficiary is sufficient to grant standing to pursue a suit for plan benefits.

§502(a)(1)(B) must be considered in this case. A working owner's standing to sue for plan benefits under ERISA is the most common context in which the standing issue arises. *Compare Santino v. Provident Life and Acc. Ins. Co.*, 276 F.3d 772 (6th Cir. 2001) (joint shareholder had standing to sue for benefits as participant); *Sipma v. Mass. Casualty, supra* (same); *Vega v. National Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999) (*en banc*) (husband and wife, as sole shareholders, had standing to sue for benefits as participants); *Engelhardt v. Paul Revere, supra* (joint shareholder has standing to sue for benefits as beneficiary); *Wolk v. UNUM, supra* (partner had standing to sue for plan benefits as beneficiary); *Prudential Ins. Co. of America v. Doe*, 76 F.3d 206 (8th Cir. 1996) (joint shareholder has standing to sue for benefits as beneficiary); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995) (husband and wife, as sole shareholders, had standing to sue for benefits as beneficiaries); *Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir.), *cert. denied*, 516 U.S. 942 (1995) (partner has standing to sue for benefits as beneficiary); *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) (sole shareholder had standing to sue for plan benefits as participant); *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990) (partner has standing to sue for plan benefits as beneficiary) *with Agrawal v. Paul Revere, supra* (sole shareholder does not have standing to sue for plan benefits, either as participant or as beneficiary); *Fugarino v. Hartford, supra* (proprietor does not have standing to sue for plan benefits as participant); *Kwatcher v. Mass. Service, supra* (sole shareholder does not have standing to sue for plan benefits as participant); *Giardono v. Jones*, 867 F.2d 409 (7th Cir. 1989) (proprietor does not have standing to sue for

plan benefits as participant). This standing issue affects every ERISA plan that covers working owners.

B. THE DEPARTMENT OF LABOR DETERMINED LONG AGO THAT WORKING OWNERS ARE PARTICIPANTS WHERE THEY ARE COVERED BY AN EMPLOYEE BENEFIT PLAN THAT INCLUDES NON-OWNER EMPLOYEES.

Unlike some federal discrimination statutes such as the Americans With Disabilities Act, ERISA does not include any "small employer exemption" nor is there any evidence that Congress intended to exclude small employers from ERISA. Consistent with congressional intent that ERISA have broad application to employers of all sizes, the Department of Labor ("DOL") issued a regulation defining the term "employee benefit plan" under ERISA. Under the regulation, plans with as few as one employee-participant, are governed by ERISA:

> For purposes of Title I of the Act and this chapter, the term 'employee benefit plan' shall not include any plan, fund, or program . . . under which *no employees* are participants covered under the plan . . . For example, a so-called 'Keogh' or 'H.R. 10' plan under which only partners or *only a sole proprietor* are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees in addition to the self-employed individuals are participants covered under the plan, will be covered under Title I.

29 C.F.R. §2510.3-3(b) (emphasis added). For purposes of determining whether a plan covers at least one employee,

a sole owner and his/her spouse are not considered employees under the regulation:

> For purposes of this section . . . [a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, *which is wholly owned by the individual or by the individual and his or her spouse. . . .*

Id. at §2510.3-3(c) (emphasis added).

Once an ERISA plan is established, the DOL has consistently concluded that all persons covered by the plan, including working owners, are considered participants in the plan. For example, the DOL was presented with the issue of whether a partner or sole proprietor is subject to ERISA's civil enforcement provision:

> [W]hether Title I [including the preemption and claims review procedures] of ERISA applies to group medical programs which provide medical coverage to a sole proprietor or a partner in an unincorporated business, as well as common law employees, and whether the claims made by such a sole proprietor or partner would be subject to the ERISA claims procedure.

[Letter from Robert J. Doyle, Director of Regulations and Interpretations, Department of Labor, to Susan Katz Hoffman, at 1 (July 31, 1992) (emphasis added) (attached as Appendix ("App.") 1).] After reviewing the breadth of ERISA preemption, the DOL stated that, although sole proprietors and partners are not considered "employees" for purposes of deciding whether a benefit plan has been established, *once a plan is established* (because other employees are covered by the plan in addition to the sole proprietor or partner), sole proprietors and partners are

participants and beneficiaries of the plan and are bound by Title I of ERISA, including the preemption and claims review provisions. *Id.* In other words, once a plan has been established, sole proprietors, partners, and other owners who are covered under the plan are subject to ERISA's claims procedures and are considered beneficiaries and/or participants for purposes of those claims. *See* DOL Reporting and Disclosure Regulations, 40 Fed. Reg. 34525, 34528 (August 15, 1975) (definition of "employee" in §2510.3-3 is for the limited purpose of determining whether a plan has any employees, and thus whether an ERISA plan exists; hence, the regulations are revised to expressly limit the definition of "employee" to §2510.3-3 in order to avoid excluding the "self-employed" from ERISA).

The 1992 DOL information letter is consistent with previous agency opinions on the issue. In DOL Advisory Opinion 79-8A (attached as App. 19), the agency stated that the wife of a partner in a partnership whose employees participated in a multi-employer pension plan was not automatically excluded from participation in the plan merely because the definition of an "employee" in §2510.3-3 is somewhat restrictive. The agency stated that the regulatory definition of "employee" was not intended to dictate a person's status under a plan once an ERISA plan is established. Likewise, in DOL Advisory Opinion 81-54A (attached as App. 14), the DOL advised as to which individuals would be counted as participants and/or beneficiaries in a scholarship fund for purposes of ERISA's reporting and disclosure requirements. Again, the agency read the terms "participant" and "beneficiary" broadly. It concluded that the term "beneficiary" would include the children of eligible individuals who may become entitled to a scholarship from the fund and that all individuals

meeting the eligibility criteria "*of the Fund*" would be participants and/or beneficiaries in accordance with ERISA. In other words, it was the eligibility criteria "of the Fund" that controlled participant and beneficiary status.

Most recently, the DOL reaffirmed its longstanding position that "the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include 'working owners' within the definition of 'participant' for purposes of Title I of ERISA." DOL Advisory Opinion 99-04 (attached as App. 4).

The DOL's regulatory interpretation of ERISA is entitled to deference. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that where an administrative agency is authorized to regulate a particular statute and where the agency's regulation is a "permissible construction" of the statute, a court must defer to the agency's interpretation. *Id.* at 843-44 ("[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). In reviewing an agency's interpretation, "the question before [the court is] not whether in its view the concept is 'inappropriate' in the general context of a program . . . but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one." *Id.* at 844. Thus, the DOL's regulation that a benefit plan is governed by ERISA where it covers at least one employee is entitled to deference. *See, e.g., Black & Decker Disability Plan v. Nord*, ___ U.S. ___, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (deferring to DOL claim regulations in holding that the treating physician rule does not apply to ERISA disability benefit determinations).

While the DOL's subsequent advisory opinions interpreting its regulation may not be entitled to *Chevron*-style deference *per se*, DOL opinions interpreting its own regulation should certainly be persuasive. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, ___ U.S. ___, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) (EEOC guidelines under the ADA are persuasive). *See also Cvelbar v. CBI Illinois*, 106 F.3d 1368, 1375 (7th Cir.), *cert. denied*, 522 U.S. 812 (1997) ("Although the position of the Secretary [of Labor], even when contained in an opinion letter of the Department, is not binding upon this court, the views of the agency charged with the administration of the statute carry considerable weight."). The DOL's "bright line" definition that working owners are "participants" is certainly a "permissible construction" of ERISA. Whether entitled to deference under the *Chevron* doctrine or whether it is merely persuasive, the DOL's position on this issue lends much needed consistency and predictability to the statute as well as to the administration of ERISA-governed plans.

C. THE MAJORITY OF CIRCUIT COURTS HOLD THAT WORKING OWNERS HAVE STANDING TO SUE FOR PLAN BENEFITS UNDER ERISA, CONCLUDING THAT SUCH A RESULT IS NECESSARY TO ENSURE UNIFORM REGULATION OF EMPLOYEE BENEFIT PLANS AND CONSISTENT APPLICATION OF PLAN TERMS.

The majority of circuits have interpreted ERISA to grant standing to working owners, including sole shareholders of corporate employers. For example, in *Madonia*, *supra*, the Fourth Circuit held that a sole shareholder of a medical corporation had standing to sue as a participant under ERISA. Among other things, the Fourth Circuit held

that a working owner's standing to sue under ERISA was consistent with congressional intent for uniform federal regulation of employee benefit plans:

> By concluding that sole shareholders can be considered 'participants' in their companies' employee welfare benefit plans, we likewise avoid the situation in which two separate bodies of law would govern a corporation's employee benefits claims. In this particular case, it would seem anomalous to have [the shareholder] seeking recovery under state law theories and [other employees] suing under ERISA. In enacting ERISA, Congress drafted its 'most sweeping federal preemption statute' in order to achieve uniformity and consistency in the law governing employee benefits . . . Disallowing shareholders such as [the plaintiff] from being plan 'participants' would result in disparate treatment of corporate employees' claims, thereby frustrating the statutory purpose of ensuring similar treatment for all claims relating to employee benefit plans.

Id. at 450.

The Fifth Circuit, sitting *en banc*, has held that where a corporate employer is owned by a husband and wife, and where the corporation sponsors an ERISA health benefits plan, the shareholders are participants under ERISA with standing to sue for plan benefits. *Vega v. National Life Ins. Services*, *supra*. As in *Madonia* and the present case, the Fifth Circuit held that the health plan was governed by ERISA because it covered at least one employee in addition to the spouse/shareholders. Once an ERISA plan was established, the Fifth Circuit held that the shareholders were considered participants in the plan. The Fifth Circuit was "persuaded by the reasoning in *Madonia*", including

that court's statement that such a result "promoted Congress' objective of achieving uniformity through the enactment of ERISA because it fostered consistency in the law governing employee benefits." 188 F.3d at 294.

Vega and *Madonia* are part of a long line of circuit court authority holding that working owners of ERISA plan sponsors have standing to sue for plan benefits under ERISA in large part because a contrary holding would frustrate Congress' objective of creating uniform regulation of employee benefit plans. *See, e.g., Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292, 1303-04 (11th Cir. 2001) ("This conclusion [that a sole shareholder has standing to sue under ERISA] also comports with common sense . . . If we accepted [the shareholder's] reading of the [DOL] regulation, then he and his wife would have a different set of rights and remedies than the other employees covered by the same plan."); *Wolk v. Unum Life Ins. Co. of America*, 186 F.3d at 357 ("As several courts of appeals have noted, 'to hold otherwise would create the anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA. Such a scenario would frustrate Congress' intent of achieving uniformity in the law governing employment benefits."); *Prudential v. Doe*, 76 F.3d at 209 (a working owner's standing to pursue ERISA remedies was supported by the policy rationale that avoided the "anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA"); *Robinson v. Linomaz*, 58 F.3d at 369 (noting that its holding that working owners have standing under ERISA once an ERISA plan is established is consistent with congressional intent and that "it would

be anomalous to have those persons benefiting from [the plan] governed by two disparate sets of legal obligations"); *Peterson v. American Health*, 48 F.3d at 409 ("To hold [that a working owner does not have standing to sue under ERISA] would create the anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA. Such a scenario would frustrate Congress' intent of achieving uniformity in the law governing employment benefits."); *Harper v. American Chambers*, 898 F.2d at 1434-35 ("[O]ur construction of the statutes defining the [working owners] as ERISA beneficiaries is consonant with the ERISA statutory scheme.").[4] Even the Sixth

[4] Several of the circuit court holdings that working owners have standing to sue under ERISA are based on the owner's status as a beneficiary, apart from his or her status as a participant. These decisions are based on the plain language of ERISA's definition of a beneficiary, which includes not only persons who are designated by a participant to receive plan benefits (e.g., such as in a life insurance policy), but also includes "a person . . . designated by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA, §3(8) [29 U.S.C. §1002(8)]. These courts have held that this definition is clear and unambiguous and includes working owners who are otherwise covered under the terms of the ERISA plan. *See, e.g., Gilbert v. Alta Health*, 276 F.3d at 1295 (a sole shareholder has standing as a beneficiary under an ERISA plan where he alleges that he is entitled to benefits under the terms of the plan); *Wolk v. Unum*, 186 F.3d at 356 (a plain language interpretation of ERISA dictates that a partner who alleges that he is entitled to benefits under the terms of an ERISA plan has standing as a beneficiary of that plan); *Prudential v. Doe*, 76 F.3d at 209-10 (a joint shareholder is a beneficiary where he alleges that he is entitled to benefits under an ERISA plan); *Robinson v. Linomaz*, 58 F.3d at 369 (the plain language of the statute dictates that a joint shareholder is a beneficiary); *Peterson v. American Life*, 48 F.3d at 409 (because a partner is designated to receive benefits under an ERISA plan, the plain language of the statute dictates that the partner is a beneficiary of the plan); *Harper v. American Chambers*, 898 F.3d at

(Continued on following page)

Circuit, which is one of two circuits to preclude sole shareholders from participant status under ERISA,[5] has acknowledged the patent inconsistency in doing so:

> When self-employed individuals are excluded from classification as participant or beneficiary, the self-employed lack standing to enforce their rights under ERISA and can sue under state law theories. ERISA was originally put into place to protect the interests of employees by imposing duties on those who fund and administer the employee benefit plans; with these protections come limitations on employees' rights to recover state law remedies. Although self-employed individuals may not need the protections offered by ERISA, because they are likely to look out for themselves in the administration of the plan, it does not follow that once a self-employed person chooses to participate in an ERISA plan and gain benefits thereunder, she should be free from the

1434-35 (same). *See also Engelhardt v. Paul Revere*, 139 F.3d at 1351 (a joint shareholder is a beneficiary where he is designated to receive benefits under an ERISA plan). Because ERISA's civil enforcement provision permits suits for plan benefits by both participants and beneficiaries, these cases hold that working owners have standing to sue under ERISA as beneficiaries even if for some reason they are not considered participants. ERISA, §502(a)(1)(B). If this Court holds that working owners are considered participants, the question of their status as beneficiaries would be moot in most cases. Even so, the question of beneficiary status is not presented in the petition before this Court and is not at issue in this case.

[5] The Sixth Circuit has held that joint shareholders of a corporate plan sponsor are participants under ERISA, even though sole shareholders, such as Dr. Yates, are not considered participants. *Compare Santino v. Provident*, *supra* (joint shareholders covered under an ERISA plan are considered participants) *with Hendon v. Yates*, *supra* (a sole shareholder is not a participant).

> limitations imposed upon her employees. Under *Fugarino*, a self-employed individual who participates in a disability plan that covers him and all of his employees will have a unique advantage: the self-employed individual can pursue a parade of state law claims that are withheld from his employees by preemption.

Agrawal v. Paul Revere, 205 F.3d at 303.

D. THE SIXTH CIRCUIT DECISION ON REVIEW CREATES INCONSISTENCY IN THE REGULATION OF ERISA PLANS AND IN THE APPLICATION OF ERISA PLAN TERMS, CONTRARY TO THE INTENT OF CONGRESS.

1. Congress Enacted ERISA To Establish Uniform Regulation Of Employee Benefit Plans In Order To Reduce The Costs Of Administering Such Plans And To Thereby Make Such Plans Available To A Greater Number Of Employees.

Congress enacted ERISA in order to promote a cost-effective private employee benefit plan system through uniform fiduciary standards and remedies. A single regulatory framework allows simplicity in plan administration. *See, e.g., Shaw v. Delta Air Lines*, 463 U.S. 85, 99 n. 20 (1983). *See also Ft. Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987) (simplicity in plan administration is achieved by establishing "a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits"). A uniform system of benefit plan regulation leads to lower administrative costs and broader availability of benefits to employees. As this Court stated in *Varity Corporation v. Howe*, 516 U.S. 489 (1996), one of the "competing

purposes" of Congress was "its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Id.* at 497.

The importance of regulatory uniformity within an employee benefit plan is amply illustrated by the decision in *Shaw*, *supra*. One of the issues in that case was whether state-mandated disability benefits that were otherwise expressly exempted from ERISA fell within federal ERISA regulation where they were administered as part of a plan that also included ERISA-governed benefits. 463 U.S. at 107-08. This Court noted that ERISA was enacted to avoid situations where "one portion of a multibenefit plan would be subject only to state regulation, while other portions would be exclusively within the federal domain." *Id.* at 107. *Shaw* recognized that "[t]he administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent." *Id.* at 107-08. Accordingly, *Shaw* held that the entire plan was regulated by ERISA, including the "non-ERISA" benefits. 463 U.S. at 108.

2. The Decision Below Creates Inconsistency In The Regulation And Application Of ERISA Plan Terms And Is Contrary To Congressional Intent For Uniform Regulation And Lower Benefit Costs.

Exclusion of working owners from ERISA's civil enforcement scheme creates a serious dysfunction within ERISA's civil enforcement scheme. This schism permits working owners to sue plan fiduciaries, who are required to administer the entire plan under federal law, for violations of state law. Other covered employees are required to

sue under federal law. Allowing working owners to maintain state law causes of action outside of ERISA's preemptive sphere creates the "mutually exclusive pockets of federal and state jurisdiction within a plan," against which this Court warned in *Shaw*. Such multiplicity of regulation and open-ended administrative and financial burdens are precisely the problems that ERISA was intended to avoid.

Exclusion of working owners from ERISA's civil enforcement scheme also creates an irony that was certainly not anticipated by Congress: because owners would have access to state law damages remedies that are not available under ERISA, working owners would have broader remedies than are available to non-owner employees. The availability of state law damages increases the cost of providing benefits, eventually reaching the point of discouraging these same owners from providing benefits to their employees in the first place. This is certainly contrary to the "protection" that Congress intended ERISA to afford working men and women.

Exclusion of working owners from ERISA's civil enforcement scheme also creates a dysfunction between the civil enforcement scheme and ERISA's other regulatory provisions. The petitioner and the United States, as *amicus curiae,* have demonstrated that multiple provisions of the statute and the Internal Revenue Code provide that working owners who participate in ERISA plans are regulated by ERISA. It would make no sense if some portions of ERISA regulated these owners' participation in employee benefit plans yet the civil enforcement provisions were found not to regulate the owners' claims for benefits under the same plans.

Exclusion of working owners from ERISA's civil enforcement scheme also results in inconsistent application of the same plan terms, as demonstrated by the following scenarios:

- Assume that a small corporation purchases long term disability insurance for its full-time employees, including the sole shareholder. Assume also that the plan expressly provides discretion to the insurer to determine eligibility for benefits. If a non-owner employee applies for benefits and the insurer denies the claim based on a determination that the employee's medical records do not evidence sufficient restrictions and limitations to qualify for the employee to be considered disabled under the policy, the employee would be required to sue under ERISA. Under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the reviewing court would defer to the insurer's factual determination and affirm that determination unless the employee proved that it was an abuse of discretion. However, if the same claim was filed by the sole shareholder and the shareholder was permitted to sue under state law, the abuse of discretion standard would most likely not apply and the court would be required to determine whether the insurer was correct in denying benefits. Depending on the evidence, the reviewing court could determine under state law that the denial of the owner's claim was wrong and should be overturned whereas, in the case of the non-owner employee, the same court might determine under ERISA that, based on the same evidence, the decision was not an abuse of discretion and should be affirmed.

- Assume the same facts as above, except that the disability benefit claim is denied based on the insurer's interpretation of a plan term. In the case of the non-owner employee's claim, a reviewing court would be required to uphold the insurer's interpretation if it

was reasonable, even if the court would have applied a different interpretation. In the case of the shareholder's claim, the reviewing court would be in the position of applying its own interpretation of the plan term that would be contrary to the interpretation applied by the insurer. In other words, the same term in the same policy could be subject to conflicting interpretations solely because one claim is brought by the shareholder under state law and the other claim is brought by a non-owner employee under ERISA. The non-owner employee would be denied benefits whereas the shareholder would collect benefits even though both denials were based on the same plan terms.

- Assume the same facts as above, except that neither the working owner nor the non-owner employee exhaust administrative appeal procedures before filing suit. Because the non-owner's claim is governed by ERISA, he or she would be required to exhaust the plan's administrative remedies before pursuing the lawsuit. *See, e.g., Norris v. Citibank, NA Disability Plan*, 308 F.3d 880 (8th Cir. 2002) (discussing exhaustion requirement under ERISA). If the working owner's claim is governed by state law, there is no corresponding exhaustion requirement, allowing the working owner to bypass administrative remedies at his or her discretion. Similarly, once the case reaches court, the non-owner's ERISA claim will be limited to a review of the administrative record, a requirement also not found under state law. *See, e.g., Perlman v. Swiss Bank Long Term Disability Plan*, 195 F.3d 975 (7th Cir. 1999) (discussing limited scope of review under ERISA). Pre-trial discovery is also limited under ERISA whereas there is no limitation under state law. *See, e.g., Perlman v. Swiss Bank, supra.*

The above examples illustrate the most fundamental defect in the decision below: exclusion of working owners from ERISA's remedies results in inconsistent and conflicting applications of plan terms and plan fiduciary benefit decisions. It certainly was not Congress' intent that ERISA should be so narrow that it allows working owners who are covered under the same benefit plan as other employees to have a better opportunity to collect benefits than their non-owner employees. The intent of Congress was that if the same plan terms apply to all persons covered under the plan, those terms should be applied consistently to all persons covered by the plan. No other result makes any sense.

E. A "BRIGHT LINE" RULE THAT WORKING OWNERS ARE PARTICIPANTS IS THE ONLY APPROACH CONSISTENT WITH THE STATUTORY LANGUAGE OF ERISA, THIS COURT'S PRECEDENTS AND CONGRESS' INTENT TO PROVIDE PLAN ADMINISTRATORS WITH CONSISTENCY AND PREDICTABILITY IN DETERMINING WHO IS A PARTICIPANT UNDER THE PLAN.

In addition to determining whether working owners have standing to sue for benefits under ERISA, the status of working owners as plan participants also governs whether ERISA-mandated claim procedures apply to benefit claims filed by working owners. ERISA, §503 [29 U.S.C. §1133] requires a two-stage process whereby the claims administrator makes an initial determination of benefit eligibility and where the participant is guaranteed at least one level of review. *Id.* The DOL has issued lengthy and detailed regulations governing the time periods applicable to these administrative reviews, the notice requirements applicable to benefit denials, what

persons are required to review the claim (including medical personnel where appropriate), and related issues. 29 C.F.R. §2560.503-1. As discussed above, the DOL has also issued multiple opinions that where a working owner is covered under a plan that also covers non-owner employees, claims for benefits filed by the working owner are subject to ERISA.

The DOL's "bright line" determination that working owners are participants is directly consistent with the language of ERISA and the manner in which this Court has required that language to be interpreted. Importantly, the DOL's approach also lends regulatory uniformity and predictability to the claims process, thereby further ensuring lower costs of maintaining ERISA plans.

It is well settled that the starting point for proper statutory construction is the language of the statute itself. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). Here the DOL's position is grounded on multiple provisions of ERISA as well as related provisions of the tax code. *See, e.g.*, DOL Advisory Opinion 99-04A (App. 4.) These statutory provisions include working owners as participants under ERISA and alleviate any need to resort to the common law, as this Court did in *Darden*.

In *Darden*, this Court was charged with interpreting the term "employee" in ERISA *vis a vis independent contractors*. 503 U.S. at 324. Looking to the statute *on that specific point*, the Court held that "Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." *Id.* Thus, in the absence of any statutory

provisions that clarified whether or not an independent contractor was a participant under ERISA, and faced with two previous situations where the Court had defined the term "employee" broadly in the absence of such legislative guidance, only to see Congress subsequently amend the statute to specify a common law meaning, the Court reasonably applied a common law definition to the term. *Id.* at 324-25.

Likewise, in *Clackamas*, *supra*, this Court incorporated common law principles into the ADA to determine the employee status of corporate shareholders. In that case, although no ADA provisions specifically resolved the question, the statutory provisions the Court found most relevant, (the ADA's exemption for small employers) actually mitigated against adopting a broader definition for the term than that dictated by common law. 123 S.Ct. at 1678-79.

Unlike the independent contractor issue in *Darden* and the ADA issue in *Clackamas*, there are statutory provisions in both ERISA and corresponding tax code provisions that do explain the participant status of working owners and that do require that working owners be considered participants when they participate in ERISA-governed plans with other non-owner employees. Unlike *Darden* and *Clackamas*, then, there is no reason to resort to the common law to resolve the issue in this case. And unlike *Darden* and *Clackamas*, resort to common law here would both "thwart the congressional design [and] lead to absurd results." *Darden*, 503 U.S. at 323.

There are also other considerations that distinguish this case from *Darden* and *Clackamas*. First, both *Darden* and *Clackamas* anticipate that each issue must be

addressed on its own and that even if a common law test is utilized, the applicable criteria may differ from situation to situation. For example, this Court applied different factors for determining employer-employee status under the ADA in *Clackamas* than it did for determining independent contractor-employee status in *Darden*. *Clackamas*, 123 S.Ct. at 1678 n. 4 (noting that the *Darden* common law "factors are not directly applicable to this case because we are not faced with drawing a line between independent contractors and employees"). Neither case mandates a hard and fast rule that must be applied under all circumstances where the question is whether someone is a participant or an "employee." Neither case mandates a common law test in all situations under ERISA.

Second, unlike the ADA where a person cannot be both an employer and an employee, ERISA anticipates the possibility in several contexts that a person may "wear two hats." For example, this Court has held that an employer may be a fiduciary of an ERISA plan with duties to participants and beneficiaries for some purposes even though the same employer may act as an employer with the right to act in its own interests for other purposes, even if those interests are detrimental to participants and beneficiaries. *See, e.g., Lockheed Corporation v. Spink*, 517 U.S. 882, 890 (1996) (employer, who is a fiduciary for some purposes, may amend plan terms to reduce available benefits because in making plan design decisions, the employer does not act as a fiduciary). Thus, the possibility that a working owner may act as an employer in some situations with respect to an ERISA plan and as a participant-employee in other situations with respect to the same ERISA plan is not at all surprising or inconsistent with the statutory design.

Third, the considerations in *Clackamas* that counseled in favor of adopting a multi-factor common law test are not applicable in this case. As stated, the ADA incorporates an exemption for small employers, evidencing congressional intent that a large group of potentially covered entities will not be subject to regulation under the ADA. *Clackamas*, 123 S.Ct. at 1678-79. This Court specifically cited the exemption as a "countervailing consideration" mitigating against adopting a definition broader than the common law. *Id.*

Here there is no such "countervailing consideration." ERISA has no small employer exemption. To the contrary, ERISA anticipates broad application, even to plans that cover only one employee. And as noted above, while ERISA may be silent as to whether its broad application applies to independent contractors, the same cannot be said with respect to "working owners." Furthermore, *Clackamas* places substantial weight on the opinions of the EEOC in regulating the ADA. As noted above, similar weight should be placed on the DOL in regulating ERISA.

Finally, unlike the ADA, this Court has already recognized that the congressional policy of uniformity in the regulation of ERISA plans overrides even explicit statutory exemptions. This Court has held that even where certain benefits are expressly excluded from ERISA, they are governed by ERISA where they are administered as part of an ERISA benefit program. *Shaw, supra. Shaw* provides substantial guidance in determining the result in this case. Even if a working owner would not be considered an "employee" generally under one or another common law test, the working owner should be regulated by ERISA as

a participant where he or she participates in an ERISA-governed plan that covers non-owner employees. No other result can satisfy the need for uniform regulation.

The petitioner suggests that the common law supports participant status for Dr. Yates. This is certainly true with respect to a shareholder of a corporation. For example, in *Madonia, supra*, the Fourth Circuit held that common law principles supported the conclusion that a sole shareholder was an employee of the corporation where the shareholder was subject to the same treatment as non-owner employees with respect to compensation and taxes, and where the common law recognized the distinction between a corporate entity and its owner. 11 F.3d at 449. In the context of corporate shareholders, application of the common law rule which respects the corporate form and includes as an "employee" any individual who chooses to accept the benefits and burdens of such a corporate form, makes eminent sense and promotes the interests of uniformity to a greater extent than a "multi-factor" common law test such as the one adopted in *Clackamas* and *Darden*.

However, such a common law test is problematic with respect to other working owners such as proprietors and partners. Frequently, proprietors and partners are treated differently from non-owner employees with respect to compensation and there is no corresponding distinction in the common law between proprietors and partners on the one hand and their business entities on the other hand. Yet, where proprietors and partners are covered under the same ERISA-governed plan as non-owner employees, there is the same potential for varied and conflicting regulation within a plan as where the working owner is a shareholder.

Thus, it is clear that importation of the common law to resolve the issue at hand will inevitably "thwart the congressional design" which not only specifically contemplates working owners as employees but also requires both uniformity and predictability. *Darden*, 503 U.S. at 326 (rejecting lower court's analysis because the analysis was "unable to furnish predictable results"). Resorting to a multi-factor test implies that some working owners will be excluded from participant status, leaving the plans in which they participate along with non-owner employees subject to varied and potentially conflicting laws, as discussed above. Application of multiple fact sensitive criteria to determine participant status will also destroy predictability. This type of analysis might be practical when one is dealing with issues that are resolved in litigation, such as whether an employer meets the minimum threshold requirement of the ADA. However, it does not make sense when laypersons must determine participant status in a pre-litigation administrative environment in order to determine what procedures are applicable to a working owner's claim for plan benefits. In fact, the time periods for making claim decisions under ERISA plans, some of which are as short as 24 hours, make it impossible for an ERISA plan claims administrator to make such a determination based on a multi-factor common law test. The ADA does not incorporate an administrative process that is similar to ERISA's claim process. In the ERISA claim administration environment, only a "bright line" test will suffice. Otherwise, hundreds of claim administrators would be required to conduct what would amount to full discovery, just to determine whether or not ERISA claim procedures are applicable in the first place. This would amount to the type of "absurd results" this Court warned against in *Darden*. 503 U.S. at 323.

Certainly Congress did not intend the claim review process required by section 503 to be such a complicated, expensive and unpredictable process. If claim administrators can apply the same administrative procedures to all persons making claims under the same plan, including working owners, the entire process is simplified and uniform. This is exactly what Congress intended.

CONCLUSION

For the reasons stated herein, this Court should reverse the ruling below.

Respectfully submitted,

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August 11, 2003

U.S. Department of Labor
Pension and Welfare Benefits Administration
Washington, D.C. 20210

July 31, 1992

[SEAL]

Ms. Susan Katz Hoffman
Pepper, Hamiltan & Scheetz
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, Pennsylvania 19103-2799

Dear Ms. Hoffman:

This is in reply to your request for an information letter regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether title I of ERISA applies to group medical programs which provide medical coverage to a sole proprietor or a partner in an unincorporated business, as well as common law employees, and whether the claims made by such a sole proprietor or partner would be subject to the ERISA claims procedure.

Section 4(a) of title I of ERISA generally provides that any employee benefit plan established or maintained by an employer engaged in commerce or in any industry or activity affecting commerce, by any employee organization representing employees engaged in commerce or in any industry or activity effecting commerce, or by both will be covered by that title unless excluded in subparagraph (b). A program providing medical coverage would generally be considered to be providing benefits among those included in the definition of an employee welfare benefit plan.

The definition of the term "employee benefit plan" contained in section 3(3) of title I of ERISA includes both employee welfare benefit plans and employee pension benefit plans. In regulation 29 CFR 2510.3-3, the Department of Labor (the Department) clarified the definition of the term "employee benefit plan" for the purposes of title I of ERISA. Paragraph (b) of §2510.3-3 provides that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan . . ." For purposes of the regulation, paragraph (c) of §2510.3-3 provides that certain individuals shall not be deemed to be employees. Specifically §2510.3-3(c) provides that:

> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual and his or her spouse, and
>
> (2) A partner in a partnership and his or her Spouse shall not be deemed to be employees with respect to the partnership.

If a benefit program were limited to individuals identified in §2510.3-3(c), the benefit program would not constitute an employee benefit plan described in section 3(3) of title I of ERISA and, therefore, would not be covered by that title. If, on the other hand, the benefit program includes one or more common law employees as well as an individual described in §2510.3-3(c), such program would be an employee benefit plan within the meaning of section 3(3) of title I of ERISA.

Employee benefit plans covered Under title I of ERISA must comply with the claims procedure provisions of section 503 of title I of ERISA and the Department's regulation concerning claims procedures, 29 CFR 2560.503-1. A plan's claims procedure applies to any participant or beneficiary covered under the employee benefit plan, including any participant or beneficiary described in §2510.3-3(c).

We hope this information will be helpful to you.

Sincerely,

/s/ Robert J. Doyle
ROBERT J. DOYLE
Director of Regulations
and Interpretations

Department of Labor

Pension & Welfare Benefit Programs

OPINION 99-04 A

February 4, 1999

REQUEST BY:

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David Potts-Dupre, Esq.
Counts & Kanne
Suite 444
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Washington, D.C. 20005

OPINION:

This is in response to your request for an advisory opinion concerning the definition of "participant" provided in section 3(7) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether individuals who own business enterprises, either wholly or in part, and who provide personal services to those businesses may be "participants," within the meaning of section 3(7) of ERISA, in a multiemployer employee benefit plan. You state that the business enterprises that are the subject of this request include businesses that are operated as corporations, sole proprietorships, and partnerships.

You submit your request on behalf of the National Electrical Benefit Fund (the NEBF), a multiemployer pension plan established jointly by the International Brotherhood of Electrical Workers (IBEW) and the National Electrical Contractors Association (NECA) pursuant

to collective bargaining. You describe the NEBF as the largest construction industry fund in the United States, with approximately 375,000 participants, over 14,000 contributing employers, and plan assets of almost five billion dollars.

The documents that you have submitted indicate that an individual can become eligible to participate in the NEBF only as a result of an employer's having executed a participation agreement with the NEBF, obligating the employer to make contributions on behalf of at least some of its employees. See Restated Employees Benefit Agreement and Trust for the National Electrical Benefit Fund (hereinafter Trust Agreement), Part I, Provision 4; sections 1.7, 1.8, 1.18, 6.3.3. An employer must agree at a minimum to make contributions on behalf of its bargaining unit employees. Id. section 6.3.1. Such an employer may elect, in addition, to contribute on behalf of its "non-bargaining unit employees." An employer may contribute on behalf of all "non-bargaining unit employees" or only those non-bargaining unit employees who were formerly bargaining unit members ("alumni"). Id.

With respect to bargaining unit employees, a participating employer must contribute to the NEBF an amount equal to three percent of "all wages and other compensation paid to, or accrued by, the Covered Employees in the . . . bargaining unit for services performed for the Covered Employer." Id. section 6.2.1. For non-bargaining unit employees, the employer must contribute to the NEBF an amount equal to the lesser of

> "(a) 3% of all wages and other compensation which the Covered Employer would pay, or which the [non-bargaining unit] Covered Employees

> would accrue, if the Covered Employees were receiving the wage rate received by the highest number of employees in the appropriate . . . bargaining unit and working the normal straight time hours provided for in the appropriate labor agreement, or (b) 3% of all wages and other compensation paid to, or accrued by, the [non-bargaining unit] Covered Employees for services performed for the Covered Employer. . . ."

Id. Section 6.2.2.

The documents that you have supplied indicate that the NEBF provides a pension benefit, which may be paid as an early retirement pension or a normal retirement pension, and a disability benefit. A participant becomes vested in his or her pension benefit upon earning at least five vesting service credits.[1] Pension benefits for vested participants are calculated by multiplying the participant's benefit service credits[2] by fixed dollar amounts that are specified in the plan. As a result, the amount of a participant's monthly pension benefit is not dependent upon the participant's actual income prior to retirement or the actual amount of contributions that an employer made on his or her behalf, but rather upon seniority in the NEBF.

[1] One vesting service credit is earned for each year after 1965 in which a participant is credited with 1000 hours of covered service for covered employment (employment during a period for which an employer is obligated to make contributions for that employee).

[2] One benefit service credit is similarly earned for each year after 1965 in which a participant is credited with 1000 hours of covered employment.

You represent that the trustees of the NEBF currently interpret its plan documents to permit "working owners"[3] to be treated as employees eligible to participate in the NEBF and therefore to become participants in the NEBF[4] The eligible "working owners" include any "owner that earns wages or self-employment income from a company," including sole proprietors of unincorporated businesses. You indicate that the working owners who currently participate in the NEBF are journeyman electricians who had worked initially as bargaining unit members for other employers that contributed to the NEBF on their behalf. They subsequently acquired ownership interests in those employers or started their own electrical businesses, sometimes in partnership with other similarly situated individuals, sometimes by creating wholly-owned corporations, and sometimes operating as sole proprietors. They continue to work as electricians and in some cases employ other union members covered by the NEBF. Most of these working owners had earned vested pension benefits in the NEBF based on their previous service as bargaining unit employees, and they began accruing additional service

[3] By the term "working owner," you apparently mean any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business, as distinguished from a "passive" owner, who may own shares in a corporation, for example, but is not otherwise involved in the activities in which the business engages for profit.

[4] This current practice has been followed only since January, 1994. In the course of its history (since its creation in the early 1960's), the NEBF's practices have varied regarding participation by individuals who have equity ownership rights in business enterprises that operate in the industry covered by the IBEW.

credits when the NEBF changed its eligibility rules in 1994 to permit working owners to participate.

You represent that the employer's payroll reports, submitted monthly to the NEBF, are used to determine an employer's contributions, based on the working owner's reported "wages," and a working owner's service credits, based on the working owner's reported hours of service. You further represent that reporting employers determine a working owner's "wages" by determining the greater of the working owner's actual gross earnings subject to employment tax for that month or the amount the working owner would have earned if he had worked at normal straight-time hours for the month at the applicable journeyman's rate. The working owner's hours of service are reported as the actual hours the working owner worked for the business during the month.

Section 3(7) of Title I of ERISA provides that a "participant" is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." Section 3(6) in turn defines an "employee" as "any individual employed by an employer." Finally, section 3(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

Title I of ERISA contains multiple indications, albeit indirect, that Congress assumed that a "working owner"

could be a "participant" in an employee benefit plan sponsored by the business in which that working owner held an ownership right, regardless of the legal form in which the business was operated. For example, section 401(a)(2) exempts certain partnership agreements from the fiduciary provisions of Part 4. This exemption would be meaningless if the partnership agreements themselves (which cover only partners, one of the categories of "working owners") were not otherwise plans covered by Title I. Further, section 403(b)(3)(A) specifically exempts from the trust requirement of section 403(a) a plan "some or all of the participants of which are employees described in section 401(c)(1) of the Code [emphasis added]." This exemption takes as its basis the assumption that the employees described in Code section 401(c)(1), namely self-employed individuals (including "working owners"), are legitimate "participants" within the meaning of Title I. Also, section 408(b)(1) exempts from section 406's prohibition of specified transactions certain non-discriminatory loans made to plan participants, including highly compensated employees, but section 408(d)(1) eliminates that exemption for owner-employees as defined in section 401(c)(3) of the Code. Inasmuch as the owner-employers described in Code section 401(c)(3) are sole proprietors and more than ten-percent partners, it is clear that the provisions in section 408 of Title I assume that such "working owners" are "participants" in the plans from which those loans would be made.

These indications of Congressional intent are supported and reinforced by the treatment of "working owners" under

the provisions of Title II and Title IV of ERISA.[5] Section 401(c) of the Internal Revenue Code (the Code) provides that self-employed individuals are included as "employees" under Code section 401(a) to the extent that they have earned income "with respect to a trade or business in which personal services of the [individual] are a material income-producing factor." Code section 401(c)(2)(A). Code section 401(c) further imposes specific additional requirements on tax-qualified pension plans that provide benefits to "owner-employees," a term defined in Code section 401(c)(3) to include employees who own the entire interest in an unincorporated trade or business or more than 10 percent of a partnership. It is thus patently clear that Title II of ERISA permits "working owners" to receive the tax benefits that flow from participation as "participants" in pension plans that meet the qualification requirements of Code section 401(a).

Title IV of ERISA (the termination insurance provisions) also expressly includes "working owners" among the "participants" who receive its protections. See ERISA section 4001(b)(1) ("an individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of [Code] section 401(c)(1) . . ."). Section 4021(b)(9) of ERISA excludes from coverage under Title IV only those

[5] Although we rely on certain provisions of Title II and Title IV in reaching the conclusions expressed in this opinion, nothing in this opinion should be construed as interpreting the provisions of those Titles that lie within the interpretive jurisdiction of the Department of the Treasury and the Pension Benefit Guaranty Corporation.

pension plans that are "established and maintained exclusively for substantial owners," i.e., sole proprietors and more than ten-percent owners of partnerships and corporations. See ERISA section 4022(b)(5)(A) (defining "substantial owner"). Title IV limits the amount of benefits that the PBGC guarantees to "substantial owners" who participate in single employer plans, but nonetheless provides a basic guarantee of such owners' pension benefits. Such a guarantee would be meaningless if Title I did not permit such owners to be participants in ERISA-covered pension plans.

In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner-employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992)[6]

[6] In Darden, the United States Supreme Court held that the definition of "employee" provided in section 3(6) of Title I did not include an individual who was an independent contractor to the

(Continued on following page)

Therefore, it is the view of the Department that there is nothing in the definitions of Title I of ERISA that would preclude a pension plan, including the NEBF, from extending plan coverage to "working owners," as described in your submission, where such coverage is otherwise consistent with the documents and instruments governing the plan and does not violate any other provisions of Title I.[7]

ERISA's fiduciary standards, however, require compliance with any other applicable federal law. Pursuant to ERISA section 514(d), nothing in Title I of ERISA shall be

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employer that established and maintained the plan. In reaching this conclusion, the Court first sought to determine whether ERISA contained any provision "either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." *Id. at 323.* Finding no guidance in the statute itself, the Court concluded that, "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *503 U.S. at 322.* We follow here the Court's analysis in Darden, although with a different result, inasmuch as we find ample guidance in ERISA as to Congress' specific intent to treat "working owners" as "participants."

[7] In its regulation at 29 C.F.R. 2510.3-3, the Department clarified that the term "employee benefit plan" as defined in section 3(3) of Title I does not include a plan the only participants of which are "an individual and his or her spouse . . . with respect to a trade of business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse" or "[a] partner in a partnership and his or her spouse." The regulation further specifies, however, that a plan that covers as participants "one or more common law employees, in addition to the self-employed individuals" will be included in the definition of "employee benefit plan" under section 3(3). The conclusion of this opinion, that such "self-employed individuals" are themselves "participants" in the covered plan, is fully consistent with that regulation.

construed to alter, amend, modify, invalidate, impair, or supersede any federal law or any rule or regulation issued pursuant to such federal law. Such federal laws include any requirements applicable to multiemployer benefit plans under the Labor Management Relations Act (LMRA). Several federal courts interpreting the LMRA have upheld decisions by plan trustees to exclude owner-employees on the ground that their inclusion would violate the LMRA. See, e.g., *Todd v. Benal Concrete Const. Co., Inc., 710 F.2d 581* (9th Cir. 1983); *Aitken v. GCU-Employer Retirement Fund, 604 F.2d 1261* (9th Cir. 1979). The Department is not authorized to issue opinions regarding the LMRA. Accordingly, the fiduciary of a plan subject to the LMRA that includes "working owners" should seek legal advice regarding the propriety of the participation of "working owners" in such plan under the LMRA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Susan G. Lahne
Acting Chief
Division of Fiduciary Interpretations
Office of Regulations and Interpretations

Department of Labor.

Pension & Welfare Benefit Programs.

OPINION 81-54 A

June 22, 1981

REQUEST BY:

Mr. Richard M. Cosgrove
Executive Director
Lansing Mechanical Contractors Association
421 Seymour Avenue
Lansing, Michigan 48933

OPINION:

This is in response to your letter of February 15, 1980 regarding the Arthur J. Faggion Scholarship Fund (the Fund) requesting an advisory opinion from the Department of Labor (the Department) with respect to certain reporting and disclosure requirements under the Employee Retirement Income Security Act of 1974 (ERISA) for the Fund, which you recognize as an employee welfare benefit plan under ERISA. Specifically, you request that the department provide an advisory opinion as to (1) which individuals should be counted as participants in the Fund, and (2) whether the Fund is exempt from certain reporting and disclosure requirements under ERISA.

Your request and the materials submitted therewith include the following facts and representations:

1. The Fund is a scholarship trust established by a trust agreement between the Plumbers and Pipefitters Union #338 (the Union), its members, and the Lansing Mechanical Contractors Association (the Association). The purpose of the Fund is to provide scholarship benefits to

children of the dues-paying members of the Union and certain employers or shareholder-employees of employers.

2. The Fund receives funds from employer contributions pursuant to a collectively bargained union contract at the rate of 4 cents per hour worked for each Union member.

3. Scholarship awards may be granted only to the children of eligible individuals. Eligibility in the Fund is limited to an individual who is:

(a) a dues paying Union member who was not delinquent in paying dues as of December 31 of the prior year and had 3,000 hours of work under the collectively bargained agreement during the three years ending with that date,

(b) an employer or shareholder-employee of the employer on December 31 of the prior year who paid wages to a member or members of the Union under the collectively bargained agreement for at least 3,000 hours during the three years ending with that date, or

(c) a deceased individual who at the time of death met the requirements of (a) or (b).

4. The duties of the Fund trustees include:

(a) designating a bank or trust company as depository of the monies of the Fund and providing for the withdrawal of such monies;

(b) receiving and depositing in the name of the Fund such monies as are received pursuant to the collective bargaining agreement;

(c) paying out such monies to the designated recipients of the awards;

(d) paying the reasonable costs and expenses of maintaining and administering the Fund;

(e) investing any unused portion of the monies as it deems appropriate in obligations of the federal and state governments and in obligations of banks, savings and loan and building and loan institutions.

With respect to your inquiry concerning which individuals should be counted as participants in the Fund, section 3(7) of ERISA defines a participant to be "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or member of such organization, or whose beneficiaries may be eligible to receive any such benefit." Section 3(8) of ERISA defines a beneficiary to be "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."

In accordance with the statements you submitted and consistent with the language of section 3(8) of ERISA, we believe those children of eligible individuals who are or may become entitled to a benefit (scholarship) by the terms of the Fund would be beneficiaries. We further believe that those individuals meeting the elibigibility criteria of the Fund would be participants in accordance with section 3(7) of ERISA.

With respect to your inquiry concerning whether the Fund is exempt from certain reporting and disclosure

requirements of contain a limited reporting exemption for certain dues financed welfare benefit plans as noted in your letter. However, this regulation applies "only to welfare benefit plans maintained by an employee organization ... paid for out of the employee organization's assets, which are derived wholly or partly from membership dues ..."

Since scholarship benefits, as provided by the Fund, are funded by regular contributions and are held in trust, we believe the limited exemption provided by section 2520.104-26 does not apply. Therefore we are of the opinion that the Fund, as currently administered, would not be exempt from complying with the Department's regulations regarding the summary plan description, summary of material modifications, annual report and summary annual report. However, if the Fund has fewer than 100 participants it may be eligible for the waiver of certain requirements provided by section 2520.104-46 of the annual reporting regulations (copy enclosed). This section provides that the plan administrator of an employee benefit plan that covers fewer than 100 participants at the beginning of the plan year is not required to –

(1) Engage an independent qualified public accountant to conduct an examination of the financial statements of the plan;

(2) Include within the annual report the financial statements and schedules prescribed in section 103(b) of the Act and §§ 2520.103-1, 2520.103-2, and 2520.103-10; and

(3) Include within the annual report a report of an independent qualified public accountant as prescribed in section 103(a)(3)(A) of the Act and § 2520.103-1.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Ian D. Lanoff
Administrator
Pension and Welfare Benefit Programs

Department of Labor.

Pension & Welfare Benefit Programs.

OPINION 79-8 A

January 30, 1979

REQUEST BY:

Mr. Robert W. Gilbert
Suite 305
400 South Beverly Drive
Beverly Hills, California 90212

Mr. Joseph M. McLaughlin
McLaughlin and Irvin
Suite 300
800 West Sixth Street
Los Angeles, California 90017

OPINION:

This is in reply to your letter of November 9, 1978, requesting an advisory opinion concerning the eligibility of Mrs. Joan Adams for participation in the Southern California Retail Clerk Unions and Food Employers Council Joint Pension Trust Fund (the Fund). Specifically, you ask whether Mrs. Adams must be automatically precluded from participating in the Fund by section 403(c)(1) of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that the Fund is a multiemployer fund jointly managed by employer and employee representatives and is subject to title I of ERISA. You also represent that Mrs. Adams, who participated in the Fund from September, 1971, until May, 1977, is the wife of the owner of a 12 1/2 percent partnership interest in Vicente Foods, where Mrs. Adams is employed and which contributes to

the Fund on her behalf. You assert that Mr. Adams owns his partnership interest as separate property, not as community property.

The Department of Labor is of the opinion that Mrs. Adams is not precluded from participating in the Fund by section 403(c)(1). Section 403(c)(1) of ERISA provides generally that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. The term "participant," as it is used in ERISA section 403(c)(1), is defined in ERISA section 3(7) to include "any employee . . . of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit." ERISA section 3(6) defines the term "employee" as "any individual employed by an employer." Regulation section 2510.3-3, which interprets section 3(3) of ERISA for purposes of title I thereof, provides, in part, that "[f]or purposes of this [regulation,] . . . a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." However, that regulation is not intended to construe "employee" as that term is used in section 3(6) of ERISA. Rather, the regulation defines "employee" only for the limited purpose of determining whether a plan has any employees, in connection with determining whether a plan exists within the meaning of title I of ERISA. Since the Fund appears to cover a number of employees and its status as a plan under title I does not appear to be in doubt, the definition of "employee" in regulation section 2510.3-3 has no relevance to the question of Mrs. Adams' status under the plan. Thus, Mrs. Adams, the wife of a partner in the firm employing her, is a participant in the Fund for purposes of section 403(c)(1) if she is employed by a contributing employer and is otherwise eligible to participate under the terms of the Fund as properly administered according to all applicable laws and plan documents.

This letter is not intended to interpret or express any opinion concerning the Labor Management Relations Act to which you referred in your inquiry or concerning any other statute (other than ERISA title I and regulations pursuant thereto).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs